

IT 95-78

Tax Type: INCOME TAX

Issue: Withholding Tax - Failure To File Return/Make Payment

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

-----  
THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS

v.

XXXXXX

Taxpayer(s)

)  
)  
)  
)  
)  
)  
)

No.

Hollis D. Worm

Administrative Law Judge  
-----

RECOMMENDATION FOR DISPOSITION

SYNOPSIS: This matter is before this administrative tribunal as the result of a timely Protest by XXXXX (hereinafter referred to as the "taxpayer") to a Notice of Deficiency (hereinafter referred to as the "Notice") issued to her on February 14, 1995. The basis of the Notice is the Illinois Department of Revenue's (hereinafter referred to as the "Department") determination that the taxpayer had failed to file a Form IL-941, Employer's Quarterly Illinois Withholding Tax Return, for the tax year ending December 31, 1992. The Notice asserted an increased tax liability, as well as a penalty pursuant to 35 ILCS 5/1005 for failure to pay the entire tax liability by the due date.

In response to the Notice of Hearing, the taxpayer's attorney submitted a letter to the Department in which he admits that the taxpayer owes the proposed tax deficiency; however, he requests the abatement of the proposed penalty based upon reasonable cause. He also indicated that he was waiving the taxpayer's right to a hearing and requested that the case be decided on the information submitted for the record. Therefore, the only issue to be resolved is:

(1) Whether a penalty should be assessed pursuant to 35 ILCS 5/1005 for underpayment of tax?

Following the submission of all evidence and a review of the record, it is recommended that the proposed tax deficiency be assessed and the penalty be cancelled.

FINDINGS OF FACT:

(1) On February 14, 1995 the Department issued a Notice of Deficiency to the taxpayer in the amount of \$732.54, to which the taxpayer responded with a timely Protest. The Notice of Deficiency proposed a \$488.50 tax liability, as well as the assessment of a penalty pursuant to 35 ILCS 5/1005 in the amount of \$244.04.

(2) Department of Revenue records indicated that the taxpayer withheld income taxes from compensation paid to her employees who were residents of Illinois but failed to file a IL-941 withholding tax return and failed to pay over the withheld funds to the Department of Revenue in a timely fashion.

(3) In correspondence with the Department, the taxpayer's attorney admits the taxpayer owes the State of Illinois a tax liability; however, he disagrees with the proposed assessment of the Section 1005 penalty.

(4) The taxpayer passed away on May 6, 1995, at the age of 84.

(5) The last few years of the taxpayer's life were spent in a care facility where, if necessary, she had access to 24 hour care.

(6) The taxpayer's attorney prepared her 1992 Illinois tax returns with instructions to mail a check with the correct amount due to the State.

(7) Due to the taxpayer's physical and mental incapacitation she failed to remit the taxes due to the State of Illinois for the 1992 tax year.

CONCLUSIONS OF LAW: A taxpayer's obligations for withholding taxes is governed by 35 ILCS 5/701 through 5/713.

Employers that maintain an office or transact business in the State of Illinois may be liable for the withholding of Illinois income taxes if they pay compensation to residents of Illinois or to non-residents if all or part of the compensation is paid in Illinois as defined by 35 ILCS 5/304

(a)(2)(B).

Once an employer meets those standards it is required to file withholding tax returns and pay over withheld taxes to the Department of Revenue in accordance with 35 ILCS 5/704 and 5/705.

The Notice of Deficiency is prima facie correct so long as its proposed adjustments meet some minimum standard of reasonableness. *Vitale v. The Illinois Department of Revenue*, 118 Ill. App. 3d 210, 454 N.E. 2d 799, 73 Ill. Dec. 702 (1983). In order to overcome this prima facie correctness the taxpayer must present competent evidence that the proposed adjustments are incorrect. *Mansini v. Department of Revenue*, 60 Ill. App. 3d 11, 376 N.E. 2d 324 (1978).

In the instant case, the taxpayer's attorney admits to the taxpayer's owing the State of Illinois taxes; however he disagrees with the proposed assessment of the Section 1005 penalty for underpayment of tax based upon reasonable cause.

The existence of reasonable cause justifying abatement of a penalty is a factual determination that can only be decided on a case by case basis, *Rorabaugh v. United States*, 611 F. 2d 211 (7th Cir., 1979) and has generally been interpreted to mean the exercise of ordinary business care and prudence, *Dumont Ventilation Company v. Department of Revenue*, 99 Ill. App. 3d 263, 425 N.E. 2d 606, 54 Ill. Dec. 741 (3rd Dist., 1981). The burden of proof is upon the taxpayer to show by a preponderance of the evidence that it acted in good faith and exercised ordinary business care and prudence in providing for the timely payment of its tax liability.

In the instant case the taxpayer was in a 24 hour care facility at the time she failed to remit the taxes due to the State of Illinois and her physical and mental impairment aided to the unintentional nonpayment of the taxes. Therefore, she had reasonable cause for underpayment of tax and although the tax should be assessed, the Section 1005 penalty should be cancelled.

Hollis D. Worm  
Administrative Law Judge

August 9, 1995